Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-516

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Petitioner,

v.

JAMES L. STEVENS AND TRANS WORLD AIRLINES, INC.,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI DISTRICT OF COLUMBIA COURT OF APPEALS

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether an employee may be denied the opportunity to demonstrate in the Superior Court that a union's arbitrary conduct and bad-faith disavowance of its promises to him subverted the arbitral process.

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI DISTRICT OF COLUMBIA COURT OF APPEALS

COUNTERSTATEMENT OF THE CASE

In accordance with his personal convictions Respondent JAMES L. STEVENS, hereinafter "Stevens," who was employed by Respondent TRANS WORLD AIRLINES, hereinafter "TWA," resigned his membership in the AIR LINE PILOTS ASSOCIATION (Petitioner herein and hereinafter referred to as "ALPA") on March 3, 1976.

Pursuant to the agency shop agreement between TWA and ALPA, union membership was not a condition of employment provided that a non-member employee paid a periodic service charge to ALPA.

Respondent Stevens objected to the compulsory service charge and accordingly withheld payment.

Stevens thereupon began receiving billing statements from ALPA which set forth the amount of accruing delinquencies in service charge payments and which stated very clearly that "payment of minimum will correct your bad standing condition." Stevens received a similar statement each month thereafter through September of 1977 when he was wrongfully discharged. Moreover each successive billing he received from ALPA for payment of the service charge included the incremental increase over the previous billing. Stevens, as a reasonable person, interpreted the above quoted language to mean that by paying the "minimum" the matter of bad standing could be rectified.

On October 11, 1976 TWA notified Stevens that he would be discharged on November 1, 1976 unless he paid the accrued compulsory service charges. Stevens chose to contest the service charge provisions via the protest procedure set forth in the relevant collective bargaining agreement, more particularly, Section 3-B(D) of same (see Petitioner's brief at page 4). He requested that TWA confirm in writing that it would not discharge him during the arbitration proceeding. The arbitration occurred on June 19, 1977. From October of 1976 through July of 1977, Stevens received monthly billings from ALPA stating that payment would correct his bad standing.

The sole issue submitted for arbitration was whether TWA could condition employment upon payment of the compulsory service charge, notwithstanding Stevens' stated philosophical objections.

Respondent Stevens has maintained throughout the travels and travails of this lawsuit, from the District of Columbia Superior Court to this bench, that he legitimately believed that at any time he could resolve the matter completely by merely forwarding a check for the amount due to ALPA. He legitimately felt that should he lose the arbitration, he could pay his service charges and go back to business as usual.

Stevens believed that TWA was pursuing his discharge solely because it was required to do so under the labor-management agreement. He also believed that ALPA only wanted payment of the delinquent service charges, not his discharge. Once he brought his account current ALPA would be satisfied. *He believed this because Petitioner advised him so repeatedly in writing.*

The arbitrator's award held that Stevens' "discharge was proper," treating it as an accomplished fact. Stevens immediately sought clarification of the award to provide that though TWA had the authority to discharge Stevens, the discharge was subject to a grace period during which he could tender payment of the delinquent assessments.

The arbitrator refused to modify or clarify the award stating that such a modification was beyond his authority since the issue of time to pay was not before him. Respondent Stevens again stresses that there was no doubt in his mind that he could reinstate himself by paying the arrearages.

On September 1, 1977, following the publication of the arbitrator's decision, Stevens received another billing from ALPA which again stated that payment would correct his bad standing condition. That bill clearly indicated that Stevens had until September 25, 1977 to make payment. Respondent Stevens was nevertheless terminated on September 9, 1977. He then immediately

tendered full payment by check and said check was cashed by ALPA.

Petitioner contends that the legend appearing on the monthly bills means that payment of the outstanding balance would restore Stevens' good standing in the association, but would not restore his job. Respondent Stevens submits that a reasonable person could construe the statement as meaning what ALPA says it means, but Stevens also submits that a reasonable person could just as easily, indeed could more easily, interpret the words the way Stevens interpreted them. Indeed, experience in all facets of personal and commercial life supports the embrasive view that one can always quiet the hounds by paying one's dues!

ALPA now says that the issue of whether Stevens should have been kept in the employ of TWA after he paid the overdue service charges, was already determined adversely to Stevens via the protest procedure. Section 3-B(E) of the protest procedure of the collective bargaining agreement provides that:

> "During the period in which a protest is being handled under the provisions of Section 3-B and until final decision by the Staff Vice President — Labor Relations, or his successor or designee, or the neutral referee, the pilot shall not be discharged from the company nor lose any seniority or any other rights under the agreement solely for reason of non-compliance with the terms and provisions of Section 3-B." Section 3-B(E) of agreement at page 14.

Stevens' status as an employee must remain inviolate during the course of the protest procedure.

Notwithstanding the fact that Stevens had moved for a clarification of the award on September 2, 1977 (Ex 5 of

Complaint), and notwithstanding the fact that Stevens' status as an employee must remain inviolate during the course of the protest procedure, TWA discharged him effective September 9, 1977.

On September 12, 1977, Stevens initiated what ALPA has described as a second protest procedure at a time when Stevens had already been terminated in violation of the express provisions of the agreement. While ALPA has maintained that Stevens invoked a second protest procedure which he failed to take to completion, ALPA has acknowledged in none of its papers, that since Stevens was discharged on September 9, 1977 he was barred from invoking the protest procedure of Section 3-B(D) of the Agency agreement, because that applied to a "pilot whose discharge is requested." Stevens was already discharged.

Respondent Stevens then brought suit against TWA and ALPA in Superior Court, alleging, inter alia, breach of contract. ALPA and TWA both filed motions to dismiss for failure to state a claim. The trial court granted these motions in September 1978 but vacated the dismissal in November of that year on Stevens' motion. Hearing on the motions to dismiss and on ALPA's later motion for summary judgment was set for March 23, 1979. On that date the trial court granted all three motions. Shortly thereafter Stevens noted his appeal from the dismissal of his case against both TWA and ALPA and from the summary judgment entered in favor of ALPA.

The Court of Appeals concluded that the trial court erred in granting the motions to dismiss Stevens' complaint against TWA and ALPA for failure to state a claim upon which relief may be granted. Summary judgment was also held improper.

ARGUMENT

STATE COURTS MAY ENTERTAIN ACTIONS INVOLVING THE VOLUNTARY ACTS OF A UNION WHICH HAVE TAINTED THE ARBITRAL PROCESS.

Petitioner seeks a disposition of this matter in a fashion that would nullify a long established federal policy regarding jurisdiction and arbitration of labor disputes. By granting Petitioner's writ this court would necessarily have to find as outdated the words of caution contained in *San Diego Building and Trades Council v. Garmon* 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959). Petitioner asks this court to grant it a right which unions have been repeatedly denied — the right to prejudice the rights of an employee by its own conduct by subverting the arbitration process, and then to assert that that very same arbitration process is a bar to judicial relief for the employee. This court has never granted a union such cavalier authority.

The *Garmon* principal is simply that: "Where exercise of state power over a particular area of activity threatens interference with a clearly indicated policy of industrial relations, it is judicially necessary to preclude the states from acting." [*Garmon, supra* at 243.]

The *Garmon* court sought to prevent "conflict between power asserted by Congress and requirements imposed by state law." [*Garmon, supra* at 344.] It carefully prescribed a doctrine that would allow an unimpeded implementation of federal labor policy without limiting the legitimate interests of states in protecting their citizens. "Due regard for the presuppositions of our embracing federal system, including the principal of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy has not required us to find withdrawal from the states of the power to regulate where the activity regulated was merely a peripheral concern of

the Labor Management Act.' [*Garmon, supra* at 243, 244.]

Moreover, in *Motor Coach Employees v. Lockridge* 403 U.S. 274, 91 S.Ct. 1909, 29 L.Ed.2d 473 (1971), the court reiterated its unwillingness to "declare pre-empted all local regulation that touches or concerns in any way the complete interrelationships between employees, employers, and unions." *Lockridge, supra* at 403 U.S. 289, 91 S.Ct. 1919.

The court has steadfastly maintained a position of "balanced inquiry" into the federal and state interests attendant to each situation. *Farmer v. United Brotherhood of Carpenters,* 97 S.Ct. 1056, 430 U.S. 290, 300 51 L.Ed. 338 (1976). In *Lockridge,* where plaintiff's claim concerned the construction of and interpretation of a union security provision similar to the one at bar, preemption was held to apply, while in *International Association of Machinists v. Marcos Gonzales,* 356 U.S. 617, (1958), the federal interests were "tangible and remote." *Lockridge, supra* at U.S. 296.

In the case at bar a union's own bureaucratic machinery operated so as to mislead a member to his own substantial detriment. Respondent Stevens has yet to see, and ALPA's petition fails to provide, even the remotest clue in the puzzle of how federal interests of paramount national importance will be advanced by denying Stevens the right and opportunity to maintain the common law theory of estoppel as a bar to his discharge. By the same token, respondent Stevens cannot fathom a more basic state interest than the right of a citizen to pursue his chosen means of maintaining a livelihood. Moreover, this court has concluded that such complaints should be "construed to avoid dismissals." *Czosek v. O'Mara,* 397 U.S. 25, 27, 90 S.Ct. 770, 25 L.Ed.2d 21 (1970).

This court has long held unions to a duty of fair representation in their dealings with employers. *Vaca v. Sipes,* 386 U.S. 171, 81 S.Ct. 903 (1966). This requires a union to treat concerned employees "without hostility or discrimination . . . to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Vaca, supra* at 386 U.S. 171. The pre-emption doctrine was held inoperable in regard to the duty of fair representation which stands "as a bulwark to prevent arbitrary union conduct toward individuals." *Vaca, supra* at 386 U.S. 182. As correctly noted by the Court of Appeals below, *Lockridge* expressly holds that state courts may entertain suits alleging unfair representation by a union [Petitioner's appendix at page 5a]. *Motor Coach Employees v. Lockridge,* 403 U.S. 274, 299.

Thus this court has been careful to ensure that judicial remedies exist for the individual employees. This Respondent contends that the conduct of Petitioner ALPA in continually promising this Respondent that he could correct his bad standing condition, while intending to discharge him, regardless of payment, falls far below even the basest standard of good faith and is, quite literally, grossly arbitrary.

This court has stressed that an employee may not be kept out of court by a party asserting either the preemption doctrine or arbitral finality when it is the very conduct of that party which provoked the complaint of injustice. The *Vaca* court stated:

> "Because these contractual remedies have been devised and are often controlled by the union, they may well prove unsatisfactory or unworkable for the individual grievant. The problem then is to determine under what circumstances the individual employee may obtain judicial review of his breach-of-contract claim despite

his failure to secure relief through the contractual remedial procedures. *Vaca, supra* at 386 U.S. 171, 185.

An obvious situation in which the employee should not be limited to the exclusive remedial procedures established by a contract occurs when the conduct of the employer amounts to a repudiation of those contract procedures. *Drake Bakeries, Inc. v. Local 50, Am. Bakery, etc., Workers,* 370 U.S. 254, 260-263, 82 S. Ct. 1346, 1350-1352, 8 L.Ed.2d 474 (1962). In such situation the employer is estopped by his own conduct to rely on the unexhausted grievance and arbitration procedures as a defense to the employee's cause of action.

After having induced Stevens' discharge while the arbitral process was in motion, ALPA, in contravention of the union contract, cannot now be heard to require adherence to the contrct as an exclusive remedy. It is simply estopped by its own conduct from doing so.

Respondent Stevens notes that Petitioner finds considerable significance in this Respondent's second invocation of the protest procedure on September 12, 1977. ALPA does not and will not lend recognition to the fact that the alleged second protest was necessitated by Petitioner's own inconsistent and arbitrary conduct and promises. Because of the September 12, 1977 letter, Petitioner continues to insist that the second issue has been arbitrated and that considerations respecting pro-arbitral finality foreclose state court remedies. Respondent Stevens cannot agree.

This court has already laid to rest the contention that arbitral finality forecloses inquiry into union conduct attendant to the arbitration. *Hines v. Anchor Motor Freight, Inc.* 424 U.S. 554, 96 S.Ct. 1048. There, a union failed to adequately and agressively represent members

who had been discharged for alleged dishonesty. The matter was fully arbitrated and the discharges sustained. The union members then filed suit claiming that their union had violated its duty of fair representation by acting arbitrarily as well as in bad faith by taking inadequate steps to ascertain the truth and present a defense. The union unsuccessfully argued that the arbitration was final and binding as required by the labor management agreement.

While the court has often acknowledged the proarbitration policy considerations specified in *Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960), it also has said, in *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 562, 563, 96 S.Ct. 1048, with respect to that policy, that:

> "(I)t is urged that when the procedures have been followed and a decision favorable to the employer announced, the employer must be protected from relitigation by the express contractual provision declaring a decision to be final and binding. We disagree. The Union's duty relieves the employee of an expressed or implied requirement that disputes be settled through contractual grievance procedures; if it seriously undermines the integrity of the arbitral process the union's breach also removes the bar of the finality provisions of the contract." *Hines, supra* at 424 U.S. 554, 567.

A binding arbitration was reviewable when tainted by breach of duty on the part of a union. *Hines, supra* at 424 U.S. 554, 568.

In the case at bar, Respondent Stevens was led to believe, and thus pursued the arbitration of a principle, with the understanding that should he lose that arbitration,

he could still cure his bad standing condition by paying back charges which the arbitration award would say he was required to pay. This understanding was created by ALPA's affirmative statements. In reliance thereon Stevens withheld payment until he had his claim arbitrated. After the arbitration Stevens learned, in contradiction to the apparent meaning of ALPA's frequent express statements, that he was to be terminated without an opportunity to cure his bad standing. Stevens was discharged while asserting the inequity and bad faith and lack of fair dealing which came to the fore. The entire arbitral process was, at the very least, tainted. Even if the meaning of ALPA's billing statement is deemed ambiguous, ALPA is the author of the ambiguity and ought to be estopped from denying the reasonable interpretation of Respondent Stevens.

Having subverted the arbitral process, ALPA cannot now be heard to proclaim arbitral finality as a bar to Stevens' cause. That would be a unique doctrine requiring reversal of a long tradition of this bar.

Lastly, Petitioner, via supplemental memorandum, asks that this writ be granted, or at least forestalled, on the coattails of *Barrantine v. Arkansas-Best Freight Systems, Inc.*, No. 79-2006.

Petitioner is making another attempt to direct a reviewing court's attention away from the facts of the case at bar. The *Barrantine* case pattern is quite distinguishable from the fact pattern in this matter. Here, the union mislead Respondent Stevens and, based upon common law theories of tort and contract, it should be estopped from profiting thereby. In *Barrantine*, the issue revolves around an employee's second attempt to have a hearing on the wages due him. Neither discharge, bad faith, or estoppel are the issues.

Contrary to Petitioner's statement that the Court of Appeals carved out an undefined exception, Stevens submits that the Court merely upheld this Court's principle that a union's affirmative acts in tainting the arbitral process can give rise to the right to judicial relief.

CONCLUSION

The District of Columbia Court of Appeals decision allows Stevens an opportunity to prove that ALPA's statement induced reliance to his substantial detriment, at once tainting the arbitral process and challenging common law tort and contract rights and theories. This Court has sanctioned this remedy, it satisfies all substantial interests and it requires no further review.

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 3340 Ocean Park Boulevard, Suite 3005, Santa Monica, California 90405: that on December 1, 1980, I served the within *Response to Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Santa Monica, California, addressed as follows:

United States Court of Appeals
District of Columbia Judicial Circuit
500 Indiana Avenue N.W.
Washington, D.C. 20001

United States District Court for the
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I declare under penalty of perjury that the foregoing is true and correct. Executed on December 1, 1980 at Santa Monica, California.

Suzanne Newman
(Original signed)